United States Court of Appeals

FOR THE NINTH CIRCUIT

NO. 19039

Seealso Vol. 3294

EDGAR W. DICKENSON, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
For the Southern District of California
Southern Division

PETITION FOR REHEARING

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TABLE OF CASES CITED

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PETITION FOR REHEARING

TO THE HONORABLE

RICHARD H. CHAMBERS, Chief Judge

STANLEY N. BARNES, Circuit Judge, and

RAY McNICHOLS, District Judge.

Appellant, EDGAR W. DICKENSON, hereby petitions for a rehearing to reconsider the judgment entered in this action on November 18, 1965, on the following grounds:

1. Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to that feature of the decision wherein he believes this Court may be convinced its result is based upon the application of incorrect legal principles.

2. This Court concedes on Page 3 of its opinion that appellant is on the borderline as to whether he was entitled to a retail exemption. This Court said:

> "It is quite obvious that Dickenson, percentagewise, was on the borderline whether he was entitled to the retail exemption."

The Government conceded that Dickenson made the 50% test but disagreed about the 75% test. (See Page 4 of the Opinion.)

(A) Thus, the statutory provisions of the Fair Labor Standards Act, if enforced in this case, will deprive plaintiff of his liberty and property without due process of law in violation of the Fifth Amendment of the Federal Constitution.

(B) It is impossible under the statute to ascertain any standard of guilt.

(C) It cannot be determined with any degree of certainty whether plaintiff is exempt or not exempt since no standards have been set to determine the basis of the 75% exemption. The penal provisions of the statute fail to sufficiently or explicitly inform appellant and those who are subject to it, what conduct on their part renders them liable to its penalties. The statute is so uncertain and indefinite that men of common intelligence must necessarily guess as to its meaning and differ as to its application.

Connally v. General Construction Company, 269 U.S. 385, 45 S. Ct. 126.

3. At most the indictment could only support two counts, Count One and one other count, since Counts Two to Six are based upon the same course of conduct. U.S.A. vs. Universal C.I.T. Credit Corp., 344 U.S. 218, 224; 93 L. Ed. 260, 73 S. Ct. 227, 22 Labor Case LC 67,295, holds as follows:

> "The offense made punishable under the Fair Labor Standards Act is a course of conduct. Such a reading of the statute compendiously treats as one offense all violations that arise from that singleness of thought, purpose or action, which may be deemed a single 'impulse', a conception recognized by this Court in the Blockburger case, supra, at 302, quoting Wharton's Criminal Law, 11th ed. Sect. 34."

This motion is made pursuant to Rule 23 of the Ninth Circuit Rules.

Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

Dated: December 15, 1965.

SANKARY, SANKARY & HORN

By /s/ MORRIS SANKARY

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ MORRIS SANKARY
Attorney